ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Accounting for Judgments And	)	CC Docket No. 93-240
Other Costs Associated	)	
With Litigation	)	

REPLY COMMENTS OF THE NYNEX TELEPHONE COMPANIES

I. INTRODUCTION

New England Telephone and Telegraph Company and New York Telephone Company (the NYNEX Telephone Companies or NYNEX) submit these Reply Comments to certain parties' comments filed October 15, 1993, in the above-captioned matter.

NYNEX showed in initial Comments that the FCC should equitably balance carrier and ratepayer interests, and implement applicable legal precedents,[1] by presuming reasonableness in the first instance of litigation costs except for adverse antitrust judgments and post-judgment settlements. The record provides very substantial support for NYNEX's position.[2] Only one commentor, MCI, submitted comments supportive of the FCC's proposals. Another commentor, Scott Rafferty, submitted a pleading that merely reiterates a farrago

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1 Mountain States Tel. Co. v. FCC, 939 F.2d 1035 (D.C. Cir. 1991) (Litigation Costs Decision), Mountain States Tel. Co. v. FCC, 939 F.2d 1021 (D.C. Cir. 1991) (Litton Accounting Appeal).

2 See Ameritech, Bell Atlantic, BellSouth, COMSAT, Pacific Cos., Southwestern Bell, U S WEST, USTA.

of assertions he has made in prior court and regulatory proceedings -- assertions which are baseless and contribute zero to the present record. We address separately below the contentions of MCI and Mr. Rafferty.

II. MCI's COMMENTS ARE UNPERSUASIVE

MCI takes the broadbrush and wrong position that (p. 3) "adverse judgments, settlements and other litigation costs related to violations of federal statutes should be presumptively excluded from the ratebase because they are not used and useful to ratepayers." MCI makes no meaningful attempt to square its position with the two D.C. Circuit decisions cited above. MCI merely notes that the Litton Accounting Appeal faulted the Commission for retroactive ratemaking in shifting costs previously booked above-the-line to below-the-line; and that the Litigation Costs Decision established rules outside the FCC's regulatory enforcement sphere.[3] MCI ignores a critical point emphasized in the Litton Accounting Appeal: "[A] pervasive element in ratemaking is reasonableness, which demands inquiry beyond the bare fact of antitrust violation."[4] MCI also disregards the Court's observation in the Litigation Costs Decision that, outside the federal antitrust context, carrier activity giving rise to liability could, at the time undertaken, reasonably be expected to produce a net benefit for ratepayers.[5] MCI fails to

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3 MCI 5-6 and notes 5-6.

4 939 F.2d at 1031.

5 939 F.2d at 1044-45.

provide any analysis or evidence responsive to the Court that would show the carrier conduct involved can properly be presumed to harm ratepayers.

MCI does acknowledge (p. 2) that the Commission should balance the interests of ratepayers and shareholders, and cites (pp. 6-7) the Litton Accounting Appeal's observation that:

> [R]egulatory authorities may disallow expenses actually incurred in the company's operation when the challenged expense is found to be exorbitant, unnecessary, wasteful, extravagant, or incurred in the abuse of discretion or in bad faith; or when the cost is nonrecurring in nature. 939 F.2d at 1029.

These points by MCI recognize that the subject matter of this proceeding essentially relates to traditional issues of ratemaking under the "just and reasonable" standard. As NYNEX noted in initial Comments (pp. 4, 12-14), under existing rules and procedures, the FCC can properly continue to evaluate under that standard any litigation costs (initially recorded above-the-line), and exclude those costs from rates in particular cases.

MCI (at p. 8) opposes the Commission's proposal to permit carriers to presumptively include in revenue requirements the "nuisance value" (i.e., saved litigation expenses) of settlements reached prior to judgment. As discussed in our initial Comments (pp. 8-11), pre-judgment settlements should be presumed reasonable and accounted for above-the-line, subject to challenge in a rate proceeding. However, should the Commission nevertheless require settlements to be recorded initially below-the-line, MCI has provided no

basis for the Commission not to readopt its prior "nuisance value" recovery policy. MCI has simply asserted (p. 8) without support that its proposal "would not discourage settlement since it can be assumed that the settlement amount would be significantly less than the ultimate judgment." Among other things, MCI ignores the high costs of litigation.

Relatedly, MCI (at pp. 8-10) urges the Commission to create incentives for carriers to settle lawsuits early by, e.g., requiring litigation expenses to be deferred and disallowed in a losing cause. But MCI overlooks the reality that carriers are "deep pockets" who, under MCI's proposal, would be targets of even more unmeritorious lawsuits. MCI's proposal would improperly tend to discourage effective defense of such lawsuits.

III. SCOTT RAFFERTY's ASSERTIONS ARE PROCEDURALLY AND SUBSTANTIVELY FLAWED

Scott Rafferty repeats allegations he has previously made in certain lawsuits, rate cases and in an FCC informal complaint. While he captions his pleading as Comments in CC Docket No. 93-240, Mr. Rafferty makes no reference to the proposals in the FCC's Notice of Proposed Rulemaking (released September 9, 1993) in this docket. Nor does Mr. Rafferty refer to, much less analyze, the Litigation Costs Decision or Litton Accounting Appeal which bear so closely upon this matter.

Mr. Rafferty's assertions are not only misplaced; they are wholly lacking in merit. Mr. Rafferty has submitted a number of proposals which he claims are based upon his personal experience in pursing his own litigation against NYNEX

(Rafferty v. NYNEX Corp.)[6] He argues that (p. 1) no legal expenses should be booked to regulated accounts unless there is advance documentation explaining how the alleged unlawful conduct benefits ratepayers and that billable costs should be limited to $250 an hour. Mr. Rafferty's proposals must be rejected.

Mr. Rafferty has styled himself as a "one-man prosecutor" of NYNEX. In the course of his crusade Mr. Rafferty's litigation style has become well-documented. In summarily dismissing the bulk of his claims in Rafferty v. NYNEX, Judge Greene observed that Mr. Rafferty "sometimes misrepresents the law, the facts, and the position of his opponents, and he quotes statements from court decisions out of context."[7] In sanctioning Mr. Rafferty, Judge Arcara stated: "This is not the first time that Mr. Rafferty misrepresented either law or fact."[8] Other judges have expressed similar views.[9]

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6 Civil Action No. 87-1521, D.D.C.

7 Rafferty v. NYNEX, 744 F. Supp. 324, 326-327 (D.D.C. 1990). The remainder of Mr. Rafferty's claims was summarily dismissed by Judge Jackson (D.D.C. October 22, 1993).

8 Discon Inc. v. NYNEX Corp., 90-CV-546A Decision and Order at 23 (W.D.N.Y. April 1, 1993), appeal dismissed, 1993 U.S. App. LEXIS 21671 (2d Cir. 1993), (motion for confirmation pending before trial court).

9 In an Order filed on February 14, 1991 granting summary judgment dismissing Scott J. Rafferty v. Mark C. Del Bianco, et al., D.C. Super., Civil Action No. 90CA5794, a pro se action by Mr. Rafferty against some of his former attorneys, Associate Judge Ricardo M. Urbina of the District of Columbia Superior Court quoted with approval

(Footnote Continued On Next Page)

Mr. Rafferty's latest filing with the Commission is no different. For example, Mr. Rafferty attempts to buttress his claim that NYNEX is misallocating legal expenses by pointing out that in New York Telephone's (NYT's) 1990 rate case, the NYPSC disallowed the legal expenses incurred by NYNEX in defending Rafferty v. NYNEX.[10] The basis for this disallowance was that on the record then before the NYPSC, there was nothing to show that NYT was a party to that litigation or that it had been accused of wrongdoing.[11] Mr. Rafferty neglects, however, to point out that subsequently Judge Haight ruled that a second lawsuit Mr. Rafferty had brought, this time naming NYT as a defendant (Rafferty v. Halprin et al.),[12] was in reality simply an attempt to relitigate Rafferty v. NYNEX. With Judge Haight's ruling,

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9 (Footnote Continued From Previous Page)

the findings of Judge Greene concerning "plaintiff's practice of sometimes inundating the court and the opposing party with materials in large volume, some of them relevant, many of them irrelevant, and some of them relevant to other pleadings or lawsuits plaintiff may have pending, so as to lay the groundwork for later complaints that not everything had been controverted or decided. Another effect of this practice is to compel the opposing party and the Court to refine the issues on their own so as to permit them to make presentations or judgments on the question whether there are genuine issues of material fact. That is, of course, improper."

10 Rafferty 2.

11 Rafferty 3.

12 1991 WL 148798 (S.D.N.Y. 1991), appeal dismissed, No. 92-7519 (2d Cir. Jan. 13, 1993), cert. denied, 61 U.S.L.W. 3772 (U.S. May 17, 1993).

NYT's interest in defending both lawsuits became indisputable and the basis for the NYPSC's earlier disallowance vanished.[13]

More flagrantly, Mr. Rafferty claims that in Rafferty v. NYNEX, Judge Jackson accused the law firm representing NYNEX of "over-lawyering" the case. What Judge Jackson actually said was: "At first blush, this would appear to be the most egregiously over-lawyered case that I have seen since the last one that I saw" (Tr. 2). Judge Jackson, addressing Mr. Rafferty, went on to say: "Everything that I see in this file and your recitation of the history of the case so far belies your representation to me that you're anxious to have an expeditious resolution of this case" (Tr. 4).

The history of Mr. Rafferty's litigation against NYNEX makes one thing abundantly clear: it is easy for someone to accuse a large corporation of wrongdoing. Because accusation is so easy, it follows that no presumption should arise that the telephone company has engaged in wrongdoing that is

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13 Furthermore, Mr. Rafferty has previously acknowledged that "several of the allegations in my civil suit" relate to "transactions with New York Tel." NYPSC Case 90-C-0191 (NYT 1990 rate case), statements of Mr. Rafferty during Deposition of Donald C. Rowe, Tr. 1178-79. Accordingly, contrary to Mr. Rafferty's contentions (p. 1), whether a company is actually named as a defendant in a lawsuit should not necessarily drive cost allocations among affiliates.

In any case, Mr. Rafferty's reference to NYPSC rate proceedings underscores that his arguments are basically ratemaking in nature, to the effect that certain legal costs should be disallowed. His arguments, while meritless in even a ratemaking context, nonetheless are more appropriately considered in such a context as opposed to being engrafted upon FCC accounting rules in this proceeding.

detrimental to the ratepayers every time a complaint is filed against a telephone company. Indeed, requiring the type of justification proposed by Mr. Rafferty would only add to the burdens of litigation and thus assist plaintiffs without benefit to the public interest.[14]

IV. CONCLUSION

The Commission should reject the arguments of MCI and Scott Rafferty. With limited exceptions, the Commission should permit carriers to account for litigation, judgment and settlement costs above-the-line as incurred.

Respectfully submitted,

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and

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14 Similarly, there is no justification for arbitrarily limiting billable costs to $250. This would at best be a potential rate case issue.

CERTIFICATE OF SERVICE

I, Julia White, hereby certify that on November 5, 1993, a copy of the foregoing REPLY COMMENTS OF THE NYNEX TELEPHONE COMPANIES in CC Docket No. 93-240 was served on each of the parties listed in the enclosed Service List by first class U. S. Mail, postage prepaid, or by hand as noted.

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